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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

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BETWEEN:

PATRICK GALO

Appellant;

v

BOMBARDIER AEROSPACE UK

Respondent.

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Before: McCLOSKEY LJ and McBRIDE J

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Ian Skelt KC and Ms Louise Murphy (instructed by The Official Solicitor, appointed by the Court, acting as next friend) for the Appellant
Mr Martin Wolfe KC (instructed by Michelle McGinley, Solicitor of the Employer Federation) for the Respondent

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McCLOSKEY LJ (*delivering the judgment of the Court*)

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Introduction

[1] Patrick Galo, whom we shall describe as "the appellant", a citizen of The Czech Republic (and EU citizen in consequence), appeals to this court against two judgments and associated orders of the Industrial Tribunal, dated 18 February 2022 and 27 June 2022 respectively, the effect whereof was to dismiss his claims summarily without consideration of their merits.

The Tribunal claims

[2] The appellant had been employed by Bombardier Aerospace Belfast (the "respondent") as a composite operator from September 2007. He brought proceedings against the respondent in the Industrial Tribunal. In his claim the complaints which he formulated were "victimisation of my statutory rights" and "unlawful discrimination on the grounds of disability …. and/or on the grounds of race …. and/or on the grounds of religious belief or political opinion". The essence of this unlawful conduct, he asserted, had entailed "… isolating and excluding me from the company's human development process of overtime, shift patterns, training, up-skilling, job-rotating on fair and equal basis by manager [identified]" and in certain other related respects. The disability which the appellant identified as Asperger's Syndrome. The Tribunal proceedings were initiated on 17 April 2013, the appellant having been suspended from work on 21 March 2013.

[3] The Tribunal did not determine any of the appellant's complaints on their merits. Rather it delivered the above-mentioned judgments and orders having adopted and completed the mechanism of "preliminary hearing". The three "preliminary issues" which it determined were:

(a) Does the President, acting alone as the Tribunal, have power to determine whether the Complainant has capacity to litigate his case?

(b) If so, what is the test to be applied in determining whether the Complainant has capacity to litigate his case?

(c) Having applied that test, does the Complainant have capacity to litigate his case?

The answers which the Tribunal supplied in its judgment of 18 February 2022 were, respectively:

(aa) "Yes."

(bb) The test to be applied was whether the appellant was capable of understanding, with the assistance of such proper explanation from legal advisers and other experts in other disciplines as the case may require, the issues upon which his consent or decision was likely to be necessary in the course of the proceedings.

(cc) The test could not be applied because the appellant had not provided the Tribunal with an extant consultant psychiatrist's report addressing his capacity to litigate or agreed to the Tribunal obtaining a report of this kind from another consultant.

[4] The Tribunal's next step was to consider rule 32(1) of the Industrial Tribunals and Fair Employment Tribunals Rules of Procedure (2020). This provides:

> "At any stage of the proceedings, either on its own initiative or on the initiative or on the application of a party, a tribunal may strike out all or part of any claim or response on any of the following grounds ….
>
> That the tribunal considers that it is no longer possible to have a fair hearing of the claim or response (or the part to be struck out)."

Next the Tribunal, as required by rule 32(2), purported to give the appellant an opportunity to make oral or written representations. This gave rise to a hiatus separating (and partly explains the reason for) the aforementioned two judgments.

[5] There followed a listing before the Tribunal on 25 March 2022. This was attended by the appellant, unrepresented and the respondent's solicitor. This stimulated the second of the two judgments. In this the Tribunal, having detailed the appellant's complaints, ruled that these –

> "… are struck out on the ground that the [Tribunal] considers that it is no longer possible to have a fair hearing of them."

In the same text the Tribunal purported to afford the appellant an opportunity to make representations in accordance with rule 32(2) and prescribed a timetable accordingly. The next development was the advent of the Notice of Appeal, undated, received in this court on 08 April 2022. The "Final Judgment on a Preliminary Ruling" followed on 27 June 2022. There was no further hearing after 25

March 2022, with the result that the appellant made no oral representations under rule 32(2). Nor did he make any written representations. The final act of the Tribunal was its order dated 18 August 2022.

Outcome of this appeal

[6] Ultimately, the respondent conceded this appeal. In permitting this course the court settled a final order in the following terms:

(a) All of the Tribunal's decisions/orders dated 24 February, 27 June and 18 August 2022 are reversed and set aside.

(b) Pursuant to section 38(1)(b) of the Judicature (NI) Act 1978 the appellant's claims are remitted to the Industrial Tribunal before a differently constituted tribunal, for adjudication in accordance with the written judgment of this court.

Notwithstanding the respondent's concession the need for a written judgment is twofold. First, it is necessary to ensure that the Tribunal understands the nature of the errors into which it fell. Second, there are important issues of practice, procedure and principle relating to litigation capacity issues in both the Fair Employment and Industrial Tribunal and this court, in particular the judicial powers and duties in play and the role of the Official Solicitor.

Litigation capacity generally

[7] Every citizen's right of access to a court for the purpose of securing independent and impartial judicial adjudication of disputes is one of the cornerstones of the common law. It has been held to be a right of constitutional stature: *Witham v Lord Chancellor* [1998] QB 575. This right is, however, subject to appropriate regulation by the state. This regulation in particular seeks to provide suitable protection to certain members of society, while simultaneously protecting tribunals and courts against the institution of proceedings which are a misuse of their process. The philosophy and rationale are generally the same both at common law and under article 6 ECHR.

[8] In United Kingdom law issues relating to a person's capacity to litigate have traditionally been assigned to the realm of practice and procedure. Thus, in every case where issues of this kind arise it is necessary, while bearing in mind the overlay of common law principle outlined above, to have resort to extant rules of court. In proceedings in the Court of Judicature of Northern Ireland the governing procedural rules are contained, in the main, in Order 80. The cornerstone provision is rule 2, which provides that a person under a disability may not bring, or make a claim in, any proceedings except by his next friend and may not defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings under a judgement or order notice of which has been served on him, except by his guardian ad litem. Per

rule 2(2), it is incumbent upon the next friend or guardian ad litem to undertake everything which in the ordinary conduct of the proceedings is required or authorised by any provision of the rules to be done by a party. Rule 2(3) provides that every next friend or guardian ad litem must act by a solicitor. In certain cases, a person may act as next friend or guardian without order of the court. In others an order of the court is required – for example, in cases where following the initiation of proceedings a party becomes a patient: see rule 3(4). In family proceedings the equivalent provisions are contained in rule 6.2 of the Family Proceedings Rules (NI) 1996. This regime expressly contemplates the possibility of the Official Solicitor acting as guardian.

[9] The powers and duties of the next friend or guardian are well established. One of the overarching principles, to borrow a Latinism, is that they are *dominus litis* as regards all procedural issues in the conduct of the proceedings. Thus, for example, they select which solicitor to instruct and may later withdraw instructions (*Almack v Moore* [1878] 2 LR IR 90). Furthermore, the action cannot be compromised without their authority. However, any compromise, undertaking not to appeal or abandonment of appeal, must be approved by the court.

[10] Fundamentally, every next friend and guardian must act in the litigant's best interests. In *Rhodes v Swithenbank* [1882] 22 QBD 577, Lord Esher MR formulated one of the basic rules in the following terms, at p 578:

> "[The next friend] undoubtedly has the conduct of the action in his hands. If, however, the next friend does anything in the action beyond the mere conduct of it, whatever is so done must be for the benefit of the infant and if, in the opinion of the court it is not so, the infant is not bound."

The court held that the next friend's act of waiving the infant's right of appeal was (a) a matter beyond the ordinary conduct of the action and (b) not for the benefit of the infant. It followed that the compromise of the action at first instance must be set aside. Bowen LJ described the next friend as "the officer of the court to take all measures for the benefit of the infant in the litigation …" Fry LJ, for his part, added:

> "A next friend has no power to enter into a compromise by which the infant gives up a right and the next friend obtains a benefit."

[11] Brightman J stated in *Whittall v Faulkner* [1973] 3 All ER 35 at 37, drawing on *Rhodes v Swithenbank*, that the position of a guardian ad litem of an infant defendant is to be equated with that of the next friend of an infant plaintiff. His Lordship approved the statement in the white book that:

> "… the object of a next friend or guardian ad litem of an infant is to supplement the want of capacity and judgement of the infant …
>
> His function is to guard or safeguard the interests of the infant who becomes his ward or protégé for the purposes of the litigation. The discharge of this duty involves the assumption by the guardian ad litem of the obligation to acquaint himself with the nature of the action in which the infant features as a defendant and the obligation to take all due steps to further the interests of the infant."

[12] In *Re Barbour's Settlement* [1974] 1 All ER 1188 Megarry J (at p 1191), in the context of discussing the responsibilities of guardian ad litem and instructed counsel, coined the memorable phrase of "helping those unable to help themselves". In resolving the particular issue his Lordship applied the overarching test of whether the measure in question was for the benefit of the minors concerned. In a concluding passage Megarry J added that the responsibilities of those acting on behalf of persons under a disability "… remain of high importance in the due administration of justice" (at p 1193).

[13] It is a matter of obvious importance that the capacity to litigate regime prevailing in England and Wales has no application to the jurisdiction of Northern Ireland. This is so because the comprehensive statutory framework established by the Mental Capacity Act 2005 ("the 2005 Act"), supplemented by the Mental Capacity Act Code of Practice, does not, with a couple of minor technical exceptions, apply in Northern Ireland. Furthermore, the Court of Protection, which has a vital role under that regime, exercises no powers in this jurisdiction. Thus, the presumption of capacity to litigate applicable to every adult, created by the 2005 Act, is inapplicable in this jurisdiction.

[14] In cases where the litigant, actual or putative, is a minor or a patient there is no assessment to be made: such persons automatically do not have capacity to bring or defend proceedings. In other cases, however – the present case being a paradigm illustration – more difficult or borderline questions about capacity to litigate may arise. In such cases courts and tribunals in Northern Ireland should have recourse to Chapter 5 of the Equal Treatment Bench Book ("ETBB") with a view to ascertaining what assistance or guidance may be derived from this source. This step will be taken with particular alertness to what we have stated in the immediately preceding paragraph. Subject to this important qualification, judges will find at pp 147–150 useful material containing a mixture of legal principle and practical suggestions. In evaluating these materials judges will be alert also that issues of capacity can arise in a variety of legal contexts. The specific context which this judgment is addressing is that of capacity to litigate. In this context the focus is on the ability of the litigant to make the broad range of choices and decisions likely to arise in the course of the

proceedings in question. Generalisations and assumptions must be avoided. An intense focus on the particular litigation context is essential.

[15] If one were to formulate a golden rule, it would be that in every case in which any issue pertaining to litigation capacity arises, the court or tribunal concerned must be proactive in fulfilment of its overarching duties to vouchsafe the litigant's constitutional right of access to a court, to conduct and determine the proceedings fairly and even-handedly, to ensure that the interests of certain litigants in particular are adequately safeguard and to protect against any misuse of its process. We shall examine infra the question of whether these duties were adequately discharged by the Tribunal in the present case.

Determining capacity to litigate

[16] The starting point is the following. In every case where a real issue arises about a party's capacity to litigate the court or tribunal concerned must make an appropriate determination. A "real" issue is to be contrasted with one which is merely fanciful, contrived or trivial. It encompasses the realistic possibility. This denotes a relatively modest threshold. The conduct of the court or tribunal must at all times be viewed through the prism of duty.

[17] The determination of a person's capacity to litigate is a matter of mixed law and fact. The legal dimension of this exercise entails identification of the test, or principles, to be applied. As noted in para [3](bb) above, the test applied by the Tribunal in the instant case was whether the appellant was capable of understanding, with the assistance of such proper explanation from legal advisers and other experts in other disciplines as the case may require, the issues upon which his consent or decision was likely to be necessary in the course of the proceedings.

[18] The Tribunal derived this test from the decision of the English Court of Appeal in *Masterman v Brutton* [2003] 1 WLR 1511. At the outset, this decision is worthy of note for the distinction which it drew between the Plaintiff's capacity to litigate and, specifically, to make an informed decision about compromising the proceedings and (on the other hand) his mental capacity to manage and administer a large award of damages. Kennedy LJ stated at para [27]:

> "What, however, does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made. It is not difficult to envisage plaintiffs in personal injury actions with capacity to deal with all matters and take all "lay client" decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with

> advice) how to administer a large award. In such a case I see no justification for the assertion that the plaintiff is to be regarded as a patient from the commencement of proceedings. Of course, as Boreham J said in White's case 12 November 1987, capacity must be approached in a common sense way, not by reference to each step in the process of litigation, but bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to interfere."

We would endorse the entirety of this passage.

[19] In the present case the Tribunal, while referring to the decision in *Masterman*, did not quote from it or identify any relevant passages. Rather, it specifically drew on a decision of the English EAT, *Stott v Leadec Limited* [UK EAT/0263/19/LA] at para [8] particularly. There the deputy judge stated *inter alia*:

> "d. The test to be applied is whether a party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and other experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings: Masterman-Lister.
>
> e. Capacity depends upon time and context: a decision in one court as to capacity does not bind another which has to consider the same issue in a different context. A final decision as to capacity rests with the Court, but, in almost every case, the Court will need medical evidence to guide it: Masterman-Lister.
>
> f. The question of capacity to litigate is not something to be determined in the abstract. The focus must be on the particular piece of litigation in relation to which the issue arises. The question is always whether the litigant has capacity to litigate in relation to the particular proceedings in which he is involved: *Sheffield City Council v E (An Alleged Patient)* [2004] EWHC 2808 (Fam), at paragraph 38."

We consider that these passages accurately distil the governing principles, with one rider. The suggestion that the court will require appropriate medical evidence "in almost every case" is to be viewed broadly and lacking in strict prescription. This will become clearer at a later stage of this judgment.

[20] The desirability of avoiding a narrow and unduly technical approach in determining whether a given person has capacity to litigate is illustrated in *Baker Tilly v Makar* [2013] EWHC 759 (QB). Sir Raymond Jack stated, at para [15]:

> "It is apparent from Master Leonard's judgment, holding that lack of capacity was established, that he based his finding that it arose 'because of an impairment of, or a disturbance in the functioning of, the mind' on the incident of 18 July. That involved a serious loss of control but a brief loss of control, from which Miss Makar quickly recovered enough to be asking a security officer for his name. That incident has to be considered against the background of Miss Makar's appearances before other judges in the same period where no question as to capacity had arisen. The absence of medical evidence cannot be a bar to a finding of lack of capacity but where most unusually circumstances arise in which medical evidence cannot be obtained, the court should be most cautious before concluding that the probability is that there is a disturbance of the mind. Section 2(3)(b) of the Act must be kept in mind. A finding of lack of capacity is a serious matter for both parties. It takes away the protected party's right to conduct their litigation. It may constitute, and here would constitute, a serious disadvantage to the other party."

In short, there are no hard and fast rules in play. We would also refer to, without repeating, paras [14] above regarding the ETTB. It follows from all of the foregoing that thye Tribunal applied the correct test.

[21] The jurisprudence belonging to this field includes a decision of the English Family Court in *Z v Kent County Council and Others* [2018] EWFC B65. The central theme of this decision is that the issue of a person's capacity to litigate must be fully addressed and determined by the court. Such decisions must of course be evidence-based. However, the court must be pragmatic, reacting to and accommodating the realities of the individual litigation matrix. A further, related theme of the judgment is that the court must make its determination on the basis of all material available evidence. Whereas in the ideal world this will include appropriate expert medical/psychiatric evidence, in those cases where this does not exist and cannot be procured, expeditiously or at all, the court must get on with the job of discharging its inalienable duties. HHJ Lazarus added that in such cases the court must strive to fulfil the overriding objective, with the protection of the relevant parties' rights and interests to the forefront of its mind. We concur.

[22] As will be clear from the preceding paragraphs of this judgment we would endorse this approach in all cases, in whatever forum, in which issues relating to a person's capacity to litigate fall to be determined.

The Tribunal's approach to capacity

[23] As noted above, the Tribunal was aware of this issue from the outset. This flowed from the terms in which the appellant had formulated his written claim. The appellant is to be commended for having done so. As a matter of good practice in every case – in whatever forum – where there are actual or possible litigation capacity issues the court or tribunal must be alerted at the earliest possible stage, irrespective of whether the litigant has representation of any kind.

[24] At this juncture it is necessary to recall that the regrettably protracted history of these proceedings includes a previous appeal to and decision of this court, differently constituted: see [2016] NICA 25. Gillen LJ, delivering the unanimous decision of this court, delivered on 02 June 2016, stated at para [5]:

> "In essence the case made on behalf of the appellant was that he was not accorded a fair hearing of his claim because the Tribunal failed to take properly into account his disability and his medical evidence, in circumstances where he was not represented from August 2014 onwards and in particular at the Tribunal hearing."

The judgment outlines a series of case management hearings spanning the period July 2013 to October 2014, seven in all. The substantive hearing was scheduled for 10 November 2014. During the immediately preceding period and on this date the appellant made a series of adjournment applications which were refused. His Asperger's Syndrome condition featured in all of these applications. Ultimately the Tribunal afforded him a couple of days latitude. On 13 November 2014 the appellant failed to appear. The tribunal acceded to the respondent's application to strike out all of his complaints except that of unfair dismissal. While the appellant attended the tribunal later that day, providing a further copy of a medical report and his written submissions containing further grounds for his adjournment request, the tribunal had already completed its hearing. The outstanding unfair dismissal claim was also dismissed, subsequently.

[25] One of the most important reasons for reviewing this aspect of the litigation history is that it illuminates why, at the stage of making the further decisions/orders now under appeal to this court, the Tribunal had at its disposal a substantial quantity of medical and psychiatric evidence, including the report of a registered intermediary. These materials occupied 99 pages and spanned the period March 2013 to January 2019. They established beyond peradventure that the appellant has the condition of Asperger's Syndrome, which belongs to a specific sub-group of autistic spectrum disorder. One of these reports, provided by a consultant clinical

psychologist (dated 12 September 2013), was generated at the request of the respondent. It is appropriate to commend the respondent for taking this course.

[26] The report of the registered intermediary, dated 11 September 2017, made approximately 40 recommendations relating to the conduct of the proceedings and the hearing, all of them designed to ensure the appellant's right to a fair hearing. This was followed by a detailed report of another consultant psychologist, to like effect. This consultant provided a further report some 15 months later. This was followed around one month later by a summary report of Dr Philip McGarry, Consultant Psychiatrist, dated 17 January 2019, arising out of his assessment of the appellant the previous day. The Tribunal hearing was scheduled to commence on 18 January 2019. Dr McGarry advised:

> "…. Mr Galo is not currently fit to participate in the Tribunal on the grounds:
>
> (a) That he lacks the ability to instruct counsel effectively; and
>
> (b) That he would not, despite the extensive arrangements put in place to facilitate him, be able to participate effectively in legal proceedings which in essence are in their nature adversarial."

Dr McGarry elaborated on these conclusions in his full report which, admirably, was compiled the following day. In this report he highlighted in particular the appellant's "poor communication" and the likelihood that this would "become even worse" in a tribunal hearing context of having to receive and answer questions.

[27] The Tribunal, doubtless arising out of this court's judgment in 2016, had by this stage conducted a "ground rules" hearing giving rise to a "ground rules" document. There is no indication that this was revisited following the significant reports of the consultant psychologist and consultant psychiatrist produced in December 2018 and January 2019. Pausing, at this stage the appellant had been represented by the Equality Commission for Northern Ireland during a period of approximately four years. It is this fact which explains the generation of the various reports belonging to the period September 2017 to January 2019. The Tribunal was in receipt of all of the reports belonging to this period.

[28] On 22 January 2019 the Tribunal conducted a case management listing, the outcome whereof was that the appellant was to attend for a litigation capacity assessment. This was arranged by the Equality Commission and resulted in a report of Dr Barbara English, Consultant Psychiatrist, dated 02 April 2019. The contents of this report stimulated a disagreement between the appellant and the Commission. On 04 April 2019 the Commission informed the Tribunal that the appellant would not co-operate in the appointment of a litigation friend. On 18 April 2019 the

Commission communicated that it was no longer assisting the appellant. On 17 July 2019 the Tribunal wrote to the Official Solicitor enquiring whether this agency would appoint a litigation friend. On 12 August 2019 the Official Solicitor responded that this was not possible. At a further case management listing on 19 October 2019 the Tribunal suggested to the appellant that he consider various advice/representation options – Autism Network NI, Mindwise, The Law Centre NI, The Labour Relations Agency and a solicitor. The next material development consisted of the Tribunal's "Judgment On Preliminary Issue" dated 18 February 2022.

[29] Already outlined in para [2] above is the litigation capacity test which the Tribunal applied. In para [20] we have confirmed the correctness of this test. It will be necessary to examine the important question of the powers available to the Tribunal. We preface this with our continuing review of the chronology of litigation events.

[30] The issue of of the powers available to the Tribunal arose squarely in the following circumstances. The Tribunal had taken the procedural course of examining as preliminary issues and at a "preliminary hearing" the three questions tabulated in para [2] above. In the course of this exercise the Tribunal received the first of the consultant psychiatrists' reports. This, it would appear, was provided by the Equality Commission. Notably, this report was the product of agreement between the parties to commission jointly an expert report addressing the issue of the psychiatric harm allegedly suffered by the appellant at the hands of the respondent.

[31] Following the provision of this report the issue of the appellant's litigation capacity was raised by counsel instructed by the Equality Commission. Dr McGarry was then engaged for the first time, for the specific purpose of making the necessary assessment. This stimulated his summary report dated 17 January 2019 *(*supra*)*. Soon thereafter the Tribunal was provided with Dr McGarry's main report. The Tribunal was informed that the appellant did not agree with this report. Counsel for the Equality Commission informed the Tribunal that continued representation of the appellant would not be provided on account of their belief that the claimant lacked capacity to litigate. The solution which they proposed was that the Tribunal would appoint an appropriate person to act as the appellant's litigation friend, following which such person could instruct the Commission to continue to represent the appellant.

[32] The Tribunal's response was that Dr McGarry's reports did not address the specific issue of the appellant's capacity to litigate. The Tribunal enquired whether the Commission would take steps to obtain a report of this kind. The Commission responded affirmatively. At this stage one possibility expressly contemplated – per the Tribunal's first judgment – was that this might –

> "…. enable an application for the appointment of a litigation friend for the claimant to be made."

It is appropriate to interpose two comments. First, the Commission had proposed that, at the appropriate future stage, the Tribunal would of its own motion appoint a next friend. Second, the judgment does not explain by whom the "application" which the Tribunal evidently had in contemplation would be made. We shall develop this important issue *infra*.

[33] Thereafter the appellant formally requested the Tribunal, in writing, to "exclude" Dr McGarry's two reports. Some three months later the Commission informed the Tribunal that a further report of a different consultant psychiatrist had been obtained, the appellant was contesting its conclusions and he was not content that it be disclosed. The Tribunal was further informed that the appellant would not consent to the appointment of a litigation friend. Next the Commission withdrew its services.

[34] A significant development occurred at this juncture. On behalf of the respondent, it was represented in writing that, in effect, an impasse had been reached leaving the proceedings in limbo:

> "In these circumstances, the respondent believes that its access to justice and right to a fair hearing is [sic] severely prejudiced and that it is coming to the point where it is no longer possible to have a fair hearing within a reasonable period under article 6(1) of the Human Rights Act. At this stage, the respondent seeks an Unless Order that unless the Claimant agrees to the disclosure of the [second consultant psychiatrist's] report and/or the appointment of a litigation friend his claim is struck out."

Seven successive case management hearings attended by the respondent's solicitor and the appellant, unrepresented, followed. During this phase the respondent formally applied for an order striking out the appellant's claims –

> "… on grounds that include that it is no longer possible for a fair hearing to take place, under rule 32(1)(e) of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (NI) 2020."

This betokens the first reference to rule 32. This was followed by the "preliminary hearing" convened by the Tribunal, on 7 July 2021. Once again those in attendance were the respondent's solicitor and the appellant, unrepresented. Pausing, the threefold purpose of this hearing, rehearsed at para [2] above, makes no mention of the respondent's rule 32 application.

[35] There is another significant feature of this phase of the Tribunal proceedings which must be highlighted. In the narrative section of its first judgment the Tribunal, having recorded the Commission's suggestion that the Tribunal appoint a litigation friend for the appellant, referred to the case of *Jhuti v Royal Mail* [UKEAT 0061/17/RN], a decision of the English EAT which held that under the English rules Employment Judges are empowered to appoint a litigation friend where a party to the proceedings lacks capacity to litigate. If the party concerned is unable to take this step the Tribunal is empowered to appoint a "suitable and willing person" to this role. Notably, the EAT founded its decision on the procedural rule empowering the Tribunal to make a case management order at any stage of the proceedings, whether on its own initiative or upon application: see rule 29 of the Employment Tribunals Rules of Procedure 2015. The Northern Irish equivalent powers are found in rules 24 and 25 of the 2020 Rules.

[36] As noted above the Tribunal, having determined that it was empowered to determine whether the appellant had capacity to litigate his case and having formulated the test to be applied – see para [3] supra – concluded that it was unable to make the requisite litigation assessment capacity because the appellant had (a) objected to disclosure of the most recent consultant psychiatrist's report and (b) withheld his consent to the Tribunal obtaining a further report from an appropriate specialist. The Tribunal then rehearsed a series of factors impelling to the conclusion that –

> "… it is no longer possible to have a fair hearing of the claimant's claims."

[37] As appears from the foregoing resume from the stage when the appellant no longer had the services of the Equality Commission and counsel the powers which the Tribunal exercised were (a) to convene extensive case management listings, (b) to isolate certain questions considered fit for consideration via the preliminary hearing mechanism, (c) to convene a preliminary hearing, (d) to provide its judgment on the three questions identified and, finally, (e) to exercise its power under rule 32(1)(e) of the 2020 Rules. The Tribunal had earlier identified, in terms, its power to appoint a litigation friend to represent the appellant. However, thereafter, it did not give consideration to whether it should do so. Furthermore, no adequate enquiry – and no determination - was made of the appellant's ability to identify a person of this kind.

The Tribunal's errors

[38] The first identifiable error into which the Tribunal fell was its failure to consider whether to take steps to appoint, or secure the appointment a, litigation friend, whether in the exercise of its power to make directions or otherwise, in the wake of its determination of the first and second preliminary issues. Furthermore the Tribunal failed to appreciate that the appointment of a litigation friend could

make a material contribution to its determination of the third issue namely whether the appellant possessed litigation capacity.

[39] The next discernible error in the Tribunal's approach was its failure to consider whether, notwithstanding the unavailability of the most recent consultant psychiatrist's report, an assessment of the appellant's capacity to litigate his case could nonetheless be carried out. The Tribunal had available to it an abundance of material having some bearing on this issue: see paras [26]–[31] above. Furthermore, the Tribunal had followed at close quarters the appellant's conduct in the course of the proceedings. Additionally, it had the benefit of material information and representations emanating from the Equality Commission and instructed counsel. The Tribunal adopted the narrow stance that a further expert psychiatric opinion was an essential prerequisite to its determination of the litigation capacity issue. This view could potentially have been tenable had it followed upon a conscientious attempt by the Tribunal to determine the issue on the basis of everything available and a conclusion that it could not do so absent such a report. The Tribunal's error was its failure to make this necessary attempt. While some sympathy for the Tribunal's approach might be appropriate, it in effect reflected a search for a Utopian state of affairs detached from the stark realities of the litigation situation prevailing.

[40] The materials upon which this court determined that the appellant lacks litigation capacity - see paras [24]–[33] supra and [73]–[74] infra - mirrored precisely those available to the Tribunal. In addition, we have outlined above the errors of law in the Tribunal's approach to this issue. It follows, logically, that the Tribunal should have determined that the appellant lacks litigation capacity and erred in law in failing to do so.

[41] The related issue which must be considered is whether the Tribunal was empowered to order the appellant to provide the most recent consultant psychiatrist's report. There is no such power available to the Tribunal in the 2020 Rules. This is unsurprising having regard to the combined considerations of litigation privilege, the essentially adversarial nature of tribunal proceedings, the confidentiality protections of the common law and the appellant's right to respect for private life guaranteed by article 8 ECHR via section 6 of the Human Rights Act. We consider that resort to the Tribunal's power under rule 27 of the 2020 Rules whereby an order requiring any person to disclose documents to a party (as might be granted by a county court) or to disclose information to a party or to attend a hearing to give evidence, produce documents or provide information would have been inappropriate accordingly.

The Rule 32 issue

[42] We have in para [5] above rehearsed the material terms of this procedural rule. The case management directions order of this court dated 31 March 2023 required the parties to address a series of issues, including the exercise of the Tribunal's power under rule 32(1)(e) of the 2020 Rules. In passing, the analogue of

this provision in the English regime is rule 37(1)(j) of the 2013 Rules, framed in identical terms. The parties' helpful further submissions confirmed that there are no decided cases in Northern Ireland relating to this provision. The aforementioned case management order posed the following specific question:

Is a decision driving a litigant irrevocably from the seat of judgement on capacity grounds, without any consideration whatsoever of the merits of their case, a proper exercise of the power enshrined in rule 32(1)(e)? Is this purely procedural provision designed to have (inter alia) this effect?

[43] It suffices to say that recourse to this self-evidently draconian procedural power must be very much the exception and never the rule. Its invocation requires of every tribunal both an awareness of this sober reality and an intense focus on the following questions in particular: which party's right to a fair hearing is in play? Is it both parties' rights to a fair hearing? In what specific and concrete respects is the relevant party's right to a fair hearing actually or potentially jeopardised? What procedural/case management/remedial/counter balancing measures are available to the Tribunal? What "reasonable adjustments" or "ground rules" are appropriate? (See in this context *TF v Public Services Ombudsman* [2022] NICA 17). Fundamentally, what is the justification for the extinguishment of the litigant's constitutional right of access to a court?

[44] None of these questions was posed in the present case. The Tribunal's reasoning was confined exclusively to the narrow medical report issue. As explained above, this approach we consider unsustainable. We consider that rule 32(1) was not designed to be invoked by the Tribunal in the circumstances prevailing,

[45] There is a free-standing issue under rule 32(2). This obliged the tribunal to afford the appellant the opportunity of making representations – oral, written or both – prior to exercising this draconian strike out power. In the first of its two judgments the Tribunal was on the correct track as regards this issue. However, a significant wrong turning is identifiable in the second judgment. By this judgment the Tribunal expressly struck out the appellant's multiple claims. Having done so, it then purported to afford to the appellant his regulatory and common law rights to make representations. We consider that this betrays a manifest error. The Tribunal was not empowered either under rule 32(1) or by the common law to first make its draconian, final strike out decision and then to invite representations as to why this decision should not be made. The correct course would have been to alert the appellant to the possibility that a strike out order might be made, specifying the grounds and to invite his representations accordingly. The Tribunal did not do so. The procedure adopted thereafter was merely perfunctory. In addition, there was an unmistakeable fetter of discretion.

[46] There is a further consideration to be highlighted. The respondent's application under rule 32(1) was based on mere assertion and founded on no

supporting evidence. This was the evidentially impoverished framework within which the respondent was asserting the denial of its right to a fair adjudication of all issues within a reasonable time. The Tribunal did not interrogate the application in this way. Its decision was made in an evidential vacuum.

[47] Furthermore, this court can identify no nexus between the appellant's possible lack of litigation capacity and the respondent's right to a fair hearing. The undetermined issue of the appellant's litigation capacity sounded exclusively on his right of access to a court and his right to a fair hearing. In addition, the tribunal nowhere acknowledged the draconian nature of the power being exercised or the constitutional right which it thereby defeated. These are further material flaws in the Tribunal's judgments.

[48] There is a further discrete issue. In circumstances where there were serious questions about the appellant's capacity to litigate the belated opportunity afforded to him to make representations under rule 32(2) can only be regarded as perfunctory.

[49] The limited jurisprudence brought to the attention of this court supports the above analyses. First there is the exhortation of Lord Hope of Craighead in *Anyanwu v South Bank Student Union* [2001] UKHL 14 at para [37]:

> "I should like first to say that, if I had reached the view that nothing that the university is alleged to have done could as a matter of ordinary language be said to have aided the student union to dismiss the appellants, I would not have been in favour of allowing the appeal. I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence. This was the point which Pill LJ was making in his dissenting judgment in the Court of Appeal [2000] ICR 221 when he said, at p 232, that the acts complained of and the alleged conduct of the university and the student union which preceded them are so entangled upon the facts alleged that it would not be appropriate to separate them at this stage."

By parity of reasoning the decision of the EAT in *Timbov v Greenwich Council For Racial Equality*, [2012] WL 4050232, endorsing the same need for acute caution in no case to answer applications in tribunal cases, is also material.

[50] More specifically, the analogous provision in England & Wales is rule 37 of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013:

> "**37.-(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -**
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."
> [our emphasis]

In *Abegaze v Shrewsbury College* (etc) [2009] EWCA Civ 96 the English Court of Appeal stated at para [17]:

> "The strike out for failing actively to pursue the case raises some different considerations. In *Evans Executors v Metropolitan Police Authority* [1993] ICR 151 the Court of Appeal held that the general approach should be akin to

> that which the House of Lords in *Birkett v James* [1978] AC 297 considered was appropriate when looking at the question whether at common law a case should be struck out for want of prosecution. (The position in civil actions has altered since the advent of the Civil Procedure Rules). That requires that there should either be intentional or contumelious default, or inordinate and inexcusable delay such that there is a substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice to the respondents."

Thus, the hurdle is a self-evidently elevated one.

Every litigant's rights further analysed

[51] While the decision in *Jhuti* belongs to an Employment Tribunal context and has no formal precedent status in this jurisdiction, the reasoning of Simler P is cogent, we consider the decision persuasive and are satisfied that it should be followed in Industrial Tribunal and Fair Employment Tribunal cases in this jurisdiction.

[52] We turn to consider the principle of effectiveness. The sphere of tribunal litigation underscores the enduring vigour and influence of the common law. This is especially evident in two of the most important decisions. In *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42 the United Kingdom Supreme Court decided unanimously that the making of a ministerial certificate the effect whereof was that the immigrant could pursue an appeal to an immigration tribunal only from abroad was unlawful. The essence of the illegality lay in the breach of the principle of effectiveness, in a context where the financial and logistical barriers to giving live evidence to the Tribunal from overseas were virtually insurmountable.

[53] Notably, the principle of effectiveness was considered to derive from the procedural dimension of article 8 ECHR. The decision of the Supreme Court displays a welcome grasp of practical realities: the unavailability of legal aid; the improbability of securing legal representation; formidable difficulties in giving and receiving instructions where legal representatives were engaged; the availability of facilities for live evidence; securing the attendance of UK based witnesses at the Tribunal hearing; and the ability to navigate one's way through bundles of documents. It is highly likely that this appeal could equally have succeeded on the basis of common law fair hearing principles and/or article 6 ECHR.

[54] The principle of effectiveness featured prominently again in *AM (Afghanistan) v Secretary of State for the Home Department and Lord Chancellor* [2017] EWCA Civ 1123. This confronted squarely the question of the effective right of access to immigration tribunals by incapacitated and vulnerable individuals. The factual matrix, in brief

compass, involved the Secretary of State's refusal of an asylum claim by a citizen of Afghanistan aged 15 years. There ensued the dismissal of the appellant's appeal by the FtT First-tier Tribunal (Immigration and Asylum Chamber) in circumstances where the evidence included the report of an expert in psychology drawing attention to the appellant's moderate learning difficulties and impaired intellectual skills and recommending that a series of measures be adopted for the hearing: informality, restrictions on those attending, specially tailored questions et al. The FtT dismissed the appeal, as did Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC") on further appeal.

[55] Neither Tribunal had paid proper attention to the expert psychological evidence. In the language of the Court of Appeal, neither Tribunal took:

> "… sufficient steps to ensure that the appellant had obtained effective access to justice and in particular that his voice could be heard in proceedings that concerned him." at [16].

The legal infirmity thereby generated was the familiar one of common law procedural unfairness. The judgment continues:

> "The appellant was a vulnerable party with needs that were not addressed." (ibid)

The framework of legal principle rehearsed by the Court of Appeal is worthy of note: at [21]

> "a. Given the gravity of the consequences of a decision on asylum and the accepted inherent difficulties in establishing the facts of the claim as well as future risks, there is a lower standard of proof, expressed as 'a reasonable chance', 'substantial grounds for thinking' or 'a serious possibility';
>
> b. While an assessment of personal credibility may be a critical aspect of some claims, particularly in the absence of independent supporting evidence, it is not an end in itself or a substitute for the application of the criteria for refugee status which must be holistically assessed;
>
> c. The findings of medical experts must be treated as part of the holistic assessment: they are not to be treated as an 'add-on' and rejected as a result of an adverse credibility assessment or finding made

prior to and without regard to the medical evidence;

d. Expert medical evidence can be critical in providing explanation for difficulties in giving a coherent and consistent account of past events and for identifying any relevant safeguards required to meet vulnerabilities that can lead to disadvantage in the determination process, for example, in the ability to give oral testimony and under what conditions (see the Guidance Note below and JL (medical reports – credibility) (China) [2013] UKUT 00145 (IAC), at [26] to [27]);

e. An appellant's account of his or her fears and the assessment of an appellant's credibility must also be judged in the context of the known objective circumstances and practices of the state in question and a failure to do so can constitute an error of law; and

f. In making asylum decisions, the highest standards of procedural fairness are required."

Predictably, the Court emphasised that this is not an exhaustive or immutable checklist at [22].

[56] The Court of Appeal next turned to consider the extant Tribunal rules, practice directions and guidance. It observed that adherence to these measures would have served to avoid the procedural unfairness which had been permitted to permeate the proceedings at both levels at [23]. The judgment states:

> "Critically, the appellant's age, vulnerability and learning disability could have been recognised as taken into account as factors relevant to the limitations in his oral testimony. Likewise, the Tribunal's procedures could have been designed to ensure that the appellant's needs (including his wishes and feelings) as a component of his welfare were considered to ensure that he was able to effectively participate."

Drawing attention to various provisions of the FtT Rules (rule 2, the overriding objective, rule 4, the Tribunal's power to regulate its own procedure and rule 14, the Tribunal's broad power to give directions) the Court concluded:

> "It is accordingly beyond argument that the Tribunal and the parties are required so far as is practicable to ensure that an appellant is able to participate fully in the proceedings and that there is a flexibility and a wide range of specialist expertise which the Tribunal can utilise to deal with a case fairly and justly. Within the Rules themselves, this flexibility and lack of formality are made clear." at [27].

[57] The Court of Appeal also placed some emphasis on the need for early alertness on the part of the Tribunal in cases of impaired capacity and the desirability of an early case management hearing and specially tailored case management directions at [28] – [29]. The judgment further draws attention to The Senior President of Tribunal's Practice Direction "First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses" [October 2008] and The Joint Presidential Guidance Note No 2 of 2010, highlighting the following specific features of these instruments:

> "a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);
>
> b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that "the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so" (PD [2] and Guidance [8] and [9]);
>
> c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);
>
> d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and
>
> e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27])."

[58] It is not clear that the decisions in *Jhuti* and *AM (Afghanistan)* have resulted in any amendments of the procedural rules or Guidance Notes considered. The combined researches of this court and the parties' legal representatives suggest that in the Tribunals concerned the appointment of litigation friends is effected by the exercise of the power to make case management directions.

[59] As the foregoing brief reflection demonstrates, the affordability of justice, the availability of legal representation and the provision of support measures such as a litigation friend are closely related subjects, all of them inextricably linked to every litigant's fundamental rights of access to a court and to a fair hearing. An assessment in any given case that alitigant is entitled to the support of a litigation friend is a matter of enormous importance to the person concerned. Its value must not be underestimated. The need for a simple, accessible, expeditious and cheap framework to give effect to the assessment that any litigant should have the benefit of a litigation friend is incontestable. In the absence of this – coupled with the necessary related public funding – the pioneering decisions in AM *(Afghanistan)* will be set to nought and our legal system will find itself paying mere lip service to the hallowed common law right to a fair hearing.

[60] Fundamentally, the judgment of the English Court of Appeal made abundantly clear that amendment of the tribunal rules of procedure this had to be the solution. We consider that this must also be the solution in the context which this judgment addresses ie, where an assessment of want of capacity to litigate has been made (as in this case) with the consequential requirement that a next friend must be appointed. In passing, this court has considered the latest online versions of the employment and immigration tribunals rules in England and Wales: these do not appear to contain any amendments reflecting the decisions in *Jhuti* and *AM (Afghanistan).* Beyond this we decline to venture.

Determining adjournment applications

[61] Some of the issues raised in the regrettably protracted history of these proceedings – and which foreseeably may recur - relate to the issue of adjourning hearings. It is appropriate to draw attention to the correct doctrinal approach to this issue (and kindred issues), set out comprehensively in the decision of this court in *TF v NI Public Services Ombudsman* [2022] NICA 17 at paras [94]–[98]:

> "[94] In *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284 (cited in *Nwaigwe* above), the matrix was that of an immigration appeal in which the central issue was the claimant's age. A so-called "fast track" first instance tribunal hearing was arranged to take place within approximately one month of his arrival in the United Kingdom. An application for an adjournment for the purpose of obtaining a suitable expert report was made one week in advance and repeated at the

hearing. Both applications were refused, and the appeal was dismissed. This was affirmed by the Upper Tribunal. Moses LJ, delivering the judgment of the Court of Appeal, stated at [13]–[14]:

> '13. In relation to both the two issues I have identified, whether the Immigration judge erred in law in refusing an adjournment and as to whether he would have reached the same conclusion, in my judgement Judge King fell into serious error. First, when considering whether the immigration judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair. In *R v Secretary of State for the Home Department ex-parte the Kingdom of Belgium and Others* [CO/236/2000 15 February 2000] the issue was whether a requesting state and Human Rights organisations were entitled to see a medical report relevant to Pinochet's extradition. Simon Brown LJ took the view that the sole question was whether fairness required disclosure of the report (page 24). He concluded that the procedure was not a matter for the Secretary of State but for the court. He endorsed a passage in the fifth edition of Smith Woolf and Jowell at pages 406-7:
>
> > 'Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The Wednesbury reserve has no place in

> relation to procedural propriety.' (page 24)
>
> The question for Judge King was whether it was unfair to refuse the appellant the opportunity to obtain an independent assessment of his age; the question was not whether it was reasonably open to the Immigration judge to take the view that no such opportunity should be afforded to the appellant. Where an appellant seeks to be allowed to establish by contrary evidence that the case against him is wrong, the question will always be, whatever stage the proceedings have reached, what does fairness demand? It is plain from reading his decision as a whole that that was not the test applied by Judge King. His failure to apply that test was a significant error."

[62] At this juncture, it is appropriate to draw attention to two reported Northern Ireland decisions, each directly in point, namely *R v SOSNI, ex parte Johnston* [1984] NIJB 10 and *In Re North Down Borough Council's Application* [1986] NI 304. Both decisions establish unequivocally the principle that the legal barometer to be applied to the lawfulness of an adjournment refusal decision of a court or tribunal (and by logical extension other public authorities) is that of natural justice, or fair hearing. The principle is expressed unambiguously by Carswell J in *North Down* at 323 a-d in a passage which bears repetition in full:

> "If a person entitled to appear at a hearing is unfairly deprived of an opportunity to present his case, that constitutes a breach of the rules of natural justice. The rule is necessarily qualified by reference to the standard of fairness, because **not every refusal of an adjournment will constitute a breach of the rules of natural justice. It has to be an unfair refusal which ties the concept of fairness in with the concept of observance of the rules of natural justice:** see *Ostreicher v Secretary of State for the Environment* [1978] 3 All ER 82, 86b, per Lord Denning MR; and see also the discussion in Wade on Administrative Law, 5th ed, pages 465-8. There are occasions when it would not be unfair to the applicant to refuse an adjournment, for example, because it would be even more unfair to other persons, or because the applicant has brought it entirely on himself, or because the applicant can be accommodated in some other way, or through a combination of factors. Cases are infinitely diverse and the tribunal has to balance out the factors to reach a fair decision. If it is not unfair to refuse an adjournment, the applicant may indeed be deprived of an

> opportunity to present his case, but that deprivation does not constitute breach of the rules of natural justice.'"
> [Emphasis supplied]

Though not binding on this court as a matter of precedent, the correctness of neither decision has, to our knowledge, never been questioned and we can conceive of no reason not to follow them.

[63] In the present case, and in many of the cases considered above, the factual matrix has been one of the tribunal concerned refusing an application to adjourn the hearing by the claimant on medical grounds. Each of these cases is different, belonging to its particular fact sensitive context. In cases of this kind factual comparisons will almost invariably be inappropriate. Having registered this warning, lessons can sometimes be learned from individual illustrative decisions read through an open and flexible lens.

[64] The principle enunciated by this court is that in any review or appellate challenge to a first instance decision to refuse an adjournment application advanced on whatever grounds, the test to be applied is whether this has had the effect of unfairly depriving the litigant of a fair hearing. It is no answer, no objection in principle, to say, particularly in cases of asserted ill health, that this must almost invariably require the first instance court or tribunal to adjourn the hearing. There are three main reasons for this. First, a litigant's fundamental right of access to a court, which is constitutional in nature and its related common law right to a fair decision-making process, does not entitle the litigant to dictate how this process is to be undertaken. Second, every court and tribunal will be jealous in guarding against any possible misuse of its process. Third, the terms of the test (above) are not absolute.

[65] It follows that a review or appellate court is unlikely to hold that a litigant has been deprived of their common law right to a fair hearing where an adjournment application is refused in any of the following illustrative situations: where medical evidence is provided which the tribunal considers inadequate – for example, where there is medical evidence describing an ailment or illness but failing to address the central question of whether the litigant is fit to attend a forthcoming hearing for its duration and give evidence and/or present their case; where a reasonable opportunity has been afforded to provide medical evidence and none is forthcoming; alternatively, where a reasonable opportunity has been afforded to provide medical evidence and something which the tribunal considers substandard materialises; where there are demonstrable inconsistencies or discrepancies in the assertion that a litigant is unfit to attend a hearing; and where the absence of medical evidence or *prima facie* reservations about any medical evidence provided is coupled with indications in the history of the proceedings of reluctant prosecution of the case or delay/obstructing tactics. The reasons why an adjournment refusal in any of these illustrations is unlikely to be unlawful are the same as set out above. First, in each of these illustrations the litigant has been afforded reasonable facilities to

vindicate their fair hearing rights. Second, particularly in the last illustration, there are indications of misusing the process of the court or tribunal concerned."

[66] One of the decided cases helpfully brought to the attention of this court by counsels' researches is *Riley v CPS* [2013] EWCA Civ 951. We have considered in particular what the English Court of Appeal stated at paras [4], [24], [27] and [28]. If and insofar as these passages are to be construed as an espousal of the *Wednesbury* principle for the purpose of determining the kind of procedural issues thrown up by this appeal and considered in the immediately preceding paragraph, it suffices to say that we respectfully disagree and to emphasise that the correct approach is set out in this judgment and in *TF*. We refer also to *Andrews v Bryson House* [2023] NICA 26 at paras [5] and [25] particularly.

> "**[4]** Accordingly the interesting question posed by Elias LJ for this court no longer arises; the appeal has to be disposed of but by reference to the *Wednesbury* test and can only succeed if there was an error of legal principle in the ET's approach or perversity in the outcome.
>
> **[24]** On the basis of Judge Hall-Smith's findings Wilkie J came to the same conclusion because he could detect no error of law in the judge's approach on his decision. The only question for us is whether there was any error of law which Wilkie J failed to detect.
>
> **[27]** It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. article 6 of the ECHR emphasises that every litigant is entitled to `a fair trial within a reasonable time'. That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in *Andreou v The Lord Chancellors Department* which are as relevant today as they were 11 years ago:
>
> > 'The tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having

> regard to the terms of article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days.
>
> **[28]** It would, in my judgment, be wrong to expect tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a Claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a tribunal. Like Wilkie J I can see no error of law and would dismiss this appeal."

[67] The foregoing approach is to be contrasted with that of this court in *TF v NI Public Services budsman* [supra] at paras [94]–[98] and, more recently, *Andrews v Bryson House* [2023] NICA 26 at paras [5] and [25] particularly. We consider that the sustainability in law of strike out decisions under rule 32 should be assessed through the prism of the litigant's constitutional right of access to a court and their right to a fair hearing. It is difficult to identify any scope for the operation of the *Wednesbury* principle.

The Official Solicitor issue

[68] The Official Solicitor is a statutory agency, established by section 75 of the Judicature (NI) Act 1978 ("the Judicature Act"). The powers of the Official Solicitor are specified in section 75(2):

> "The Official Solicitor shall have such powers and perform such duties as may be prescribed and as may be conferred or imposed on him –
>
> (a) By or under this or any other Act; or
>
> (b) By or in accordance with any direction given by the Lord Chief Justice."

Thus, the specific powers and duties of the Official Solicitor have two sources, namely (a) the Judicature Act and any other specific statutory provision and (b) directions of the Chief Justice.

[69] The Directions which have been made by the Office of the Chief Justice, dated 4 April 2019 and 4 January 2023 respectively, are confined to (a) acting as guardian litem for a person suffering from a personality disorder in family proceedings and (b) so acting in specified cases in the Family Proceedings Court.

[70] In the narrative passages of the Tribunal's first judgment it is recorded that in July 2019 the President wrote to the Official Solicitor enquiring whether she would consider appointing a litigation friend for the appellant. The Official Solicitor's response was that her powers to act as next friend or guardian ad litem were confined to cases at the level of the County Court and above and, further, only where no one else was suitable, willing or able to assume either such role, and where the litigant concerned had been found to lack the capacity to give instructions as the result of a mental disorder as defined under the Mental Health (NI) Order 1986 (the "1986 Order").

[71] Mr William Gowdy KC, instructed by the Official Solicitor initially, submitted that the Official Solicitor's response to the Tribunal's enquiry is unimpeachable. He drew to the attention of the court the directions which have been made by the Office of the Chief Justice. These identify the courts and proceedings in which the Official Solicitor is empowered and/or required to act. They do not encompass tribunal proceedings. This submission also drew attention to order 111, rule 1 of the Rules of the Court of Judicature (NI) 1980. We consider that therein one finds the procedural out-workings of the Official Solicitor's powers derived from the two aforementioned sources and not the conferral of any new powers. No contrary submission was made on behalf of the respondent. Mr Skelt KC and Ms Louise Murphy, of counsel, acting as next friend of the appellant pursuant to the direction of this court, did not demur.

[72] It follows that as the law stands at present in the jurisdiction of Northern Ireland the Official Solicitor has no power to act in any capacity in tribunal proceedings.

This litigation capacity issue in this court

[73] As noted above, in furtherance of the foundational principle that every court and tribunal is both empowered and obliged to make a determination about litigation capacity in every case where this issue arises, this court, having considered all available material, ruled at an earlier stage that the appellant lacks litigation capacity. Two consequences followed. First, the Official Solicitor accepted the court's invitation to act as amicus. Secondly, the court subsequently modified this arrangement by appointing the Official Solicitor as the appellant's next friend. These events occurred in the wake of the court having strongly exhorted the appellant to cooperate fully with the Official Solicitor and in a context wherein there was no prospect of him securing legal representation.

[74] Having made its assessment that the appellant lacked capacity to prosecute his appeal, the steps taken by this court to appoint a next friend were in furtherance of its duty to do so. The court investigated with the parties the question of whether either the court or the Official Solicitor could, in effect, purport to require the appellant to submit to an appropriate specialist assessment of his capacity to litigate. We consider that no such power exists: it is precluded by the common law protection of personal autonomy. Furthermore, we consider that neither the Tribunal nor this court was empowered to compel production of the psychiatric report which the appellant wished to withhold, having regard to his common law right to confidentiality, his right to respect for private life, protected by rticle 8 ECHR via the Human Rights Act and litigation privilege, as to which see *R v Davies* [2002] EWCA Crim 85 at [28] and [31] and Passmore On Privilege (4th ed) paras 3-269 to 3-271.

Going forward

[75] We have ruled that the Tribunal is empowered to appoint a next friend to represent the appellant's interests. Following the remittal of this appeal to the Tribunal, whither? The main answer is that a significant lacuna in the Tribunal's procedural code (supra) will at once be exposed. The 2020 Rules make no provision for the appointment of a next friend. The provisions in the Rules of the Court of Judicature, the County Court Rules and the Family Proceedings Rules make abundantly clear why the procedural rules of every court and tribunal must regulate this issue. This is particularly so in the case of tribunals, which can lay no claim to inherent jurisdiction, unlike the High Court.

[76] In this case the Tribunal is to be commended for the enquiries which were addressed to the Law Society and the Bar Council. However, in retrospect, these can only be regarded as forlorn in nature. It is evident that they failed to elicit any positive response and the expectation is that this will recur if the same attempt is made following remittal of this appeal. The ideal solution would appear to be a suitable amendment of the 2020 Rules establishing a discrete regime appropriate for this purpose. The appropriate rule making agency is The Department for the Economy (per Article 9 of the Industrial Tribunals (NI) Order 1996). The possibility

of the Tribunal formulating a suitably tailored practice direction will doubtless be considered also. In this respect the breadth of Regulation 14 of the 2020 instrument is striking.

[77] This court is aware that any necessary changes to the 2020 Rules, or other suitable solution, will not materialise overnight. Indeed, there is no guarantee that any formal solution will materialise at all. Where will this leave the Tribunal following remittal? Self evidently the fresh determination of the appellant's claims cannot be delayed indefinitely. Thus, as a first observation, an adjournment *sine die* will not be an available option. As a matter of realistic prediction, the appellant will be unrepresented, while the respondent will continue to have legal representation. The respondent has already provided substantial assistance to the Tribunal in the matter of how to grapple with the conundrum and is most unlikely to have anything useful to add. There is the added consideration that the respondent should not be expected to bear the further costs burden of providing the Tribunal with advice on an issue which is remote from the claims themselves.

[78] It is appropriate to draw attention to the powers and potential role of the Equality Commission. This agency is empowered to fund and provide representation in discrimination claims in Industrial and Fair Employment Tribunal cases: see The Equality (Disability, etc) (NI) Order 2000 (NI 2) Article 9, The Employment Equality (Sexual Orientation) Regulations SR (NI) 2003/497 regulation 40, The Employment Equality (Age) Regulations SR (NI) 2006/261 regulation 47, The Equality Act (Sexual Orientation) Regulations SR (NI) 2006/439 regulation 45, The Fair Employment and Treatment (NI) Order 1998 (NI 21) Article 45, The Race Relations (NI) Order 1997 (NI 6) Article 64 and The Sex Discrimination (NI) Order 1976 (NI 15) Article 75. These provisions empower the Commission to provide "legal or other representation". This would appear sufficiently broad to include acting as litigation friend and incurring the cost of so doing. The stance of the Commission in this protracted litigation suggests that this might not be contentious. For the avoidance of doubt, this court is not purporting to determine this issue definitively.

[79] The Tribunal will, of course, be at liberty to obtain its own legal advice in the light of this judgment and we would strongly encourage it to do so. The further consideration which we would highlight is that this judgment will undoubtedly come to the attention of the Office of the Lady Chief Justice ("OLCJ") which will thereby have an opportunity to reflect on whether the lacuna exposed by this judgment should, even as an interim measure, be addressed by a specific direction under section 75(2)(b) of the Judicature (NI) Act 1978 following appropriate engagement and consultation with relevant agencies.

[80] Thus, following remittal of this appeal to the Tribunal a workable solution might emerge. However, if none of the possibilities (or anything kindred) mooted above materialises, where will this leave the Tribunal? This court cannot venture beyond formulating the following propositions, all of them based upon two overlapping cornerstone principles of the common law, namely the appellant's

constitutional right of access to the Tribunal and his correlative right to a fair hearing, each of them duly seasoned by the principle of effectiveness:

(a) Dismissing the appellant's claims in "limine", as the Tribunal did in the judgments successfully challenged in this court, will not be an option.

(b) A lengthy adjournment is manifestly not an option.

(c) The appellant's foreseeable lack of co-operation will not provide a basis for declining to find the best solution possible in the circumstances: a litigant's lack of co-operation is one of the vagaries to be expected in the case of a person who has been assessed as lacking capacity to litigate.

(d) If a suitable next friend can be identified it will be appropriate for that person to instruct a solicitor, mirroring the requirement contained in the procedural codes of courts.

(e) This in turn would pave the way for an application to the Legal Services Agency for exceptional funding should it emerge that the appellant cannot fund legal representation, with the possible renewed involvement of the Equality Commission to follow.

(f) All of the steps to be taken by the Tribunal will fall within the aegis of its powers under rules 2, 4, 8, 24-25, 35 and 55-57 of the 2020 Rules, which invest the Tribunal with flexible tools. Thus, the Tribunal need have no concerns about its procedural powers.

[81] Having exercised its case management powers as fully and creatively as possible the Tribunal may conceivably find itself in a situation which it considers unsatisfactory. It must, however, be guided at all times by its overarching duty to give effect to the appellant's constitutional right of access to the Tribunal for the determination of his claims, coupled with his inalienable right to a fair hearing. These will be the immutable touchstones at every stage.

An overarching message

[82] We make the following final observations with some emphasis. The issue of any party's capacity to litigate is intrinsically fact sensitive and intensely contextual. The court or tribunal concerned has an inalienable duty to make the requisite determination. This will not necessarily require expert evidence, whether psychiatric or otherwise, in every case. While expert evidence may well be the norm in practice it is not a "sine qua non" of the necessary judicial assessment. A broad and flexible judicial approach is required. The two overarching legal rights in play are the litigant's constitutional right of access to a court and their right to a fair hearing. The court must be proactive in appropriate cases. In every judicial litigation capacity assessment an intense focus on the nature of the proceedings and the

identity, characteristics and procedural features of the court or tribunal concerned is of fundamental importance. This will entail having careful regard to special procedural measures or, in the current lexicon, "reasonable adjustments" and "ground rules", together with all relevant procedural rules and any material practice direction.

Our conclusions summarised

[83] We summarise our main conclusions in the following way:

(a) The Northern Ireland capacity to litigate regime differs from that in England and Wales.

(b) It is the inalienable duty of the court to determine a person's capacity to litigate where this issue arises.

(c) Expert evidence for this purpose is not invariably essential.

(d) A person's capacity to litigate is an intrinsically fact sensitive and contextual issue.

(e) The two overarching rights in play are the person's constitutional right of access to a court or tribunal and their right to a fair hearing.

(f) The Tribunal erred in law in failing to determine the appellant's capacity to litigate.

(g) The Tribunal, in common with this court, should have determined that the appellant lacks capacity to litigate.

(h) The Tribunal erred in law in invoking and applying rule 32 of the Industrial Tribunals and Fair Employment Tribunals Rules of Procedure.

(i) The threshold for resorting to rule 32 is an elevated one and the procedural requirements are exacting.

(j) The Tribunal is competent to appoint a litigation friend for a litigant lacking capacity to litigate under Regulation 14 of The Industrial Tribunals and Fair Employment Constitution and Rules of Procedure Regulations (NI) 2020 and Schedule 1, rules 2, 4, 8, 24–25, 35 and 55–57.

(k) The legality of adjournment rulings falls to be determined by reference to the affected litigant's constitutional right of access to a court or tribunal and common law right to a fair hearing.

(l) The Tribunal has no power to order production of a medical report to which litigation privilege applies.

(m) The Official Solicitor is not competent to act in Industrial Tribunal or Fair Employment Tribunal proceedings in Northern Ireland.

Footnote

[84] The hearing phase of this appeal achieved finality on 12 June 2023 when the court finalised its order and informed the parties that this judgment would be prepared. The judgment was then promulgated on 3 July 2023 and finalised thereafter following receipt of the parties' responses to certain queries raised by the court. The appellant applied for permission to appeal to the Supreme Court to challenge this court's earlier ruling that he does not have litigation capacity. The appellant also raised the issues of "criminal conspiracy/criminal negligence … [and] … corrupt practice …" on the part of this court. We refuse this application on the ground that it fails to coherently formulate any point of law, much less any point of law of general public importance.